

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR08-122

JIMMY MCCOY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 17, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SECOND DIVISION
[NO. CR-2006-4755]

HONORABLE CHRISTOPHER
CHARLES PIAZZA, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Chief Judge

Jimmy McCoy was found guilty at a jury trial of residential burglary, aggravated robbery, theft of property, and numerous counts of kidnapping. On appeal, he argues that the evidence is insufficient to support two of his kidnapping convictions because the State failed to prove that these victims were restrained without consent. Appellant challenges the sufficiency of the evidence to support all of his convictions on the ground that there was no credible evidence identifying him as the perpetrator. Finally, appellant argues that the trial court erred in denying his request for a mistrial. We affirm.

We first address appellant's arguments relating to the sufficiency of the evidence to support his convictions. In reviewing a challenge to the sufficiency of the evidence, we consider only the evidence that supports the verdict, viewing the evidence in the light most favorable to the State. *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000). The test is

whether there is substantial evidence to support the verdict, which is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* Resolution of conflicts in testimony and assessment of witness credibility is for the fact finder. *Id.*

There was evidence that appellant was one of a group of armed and masked men who entered a house where drugs were being sold, knocked one woman unconscious, held the remaining occupants at gunpoint, handcuffed them with zip ties, and demanded money from the drug dealer. When the drug dealer told the robbers that the drug money was located elsewhere, they took him from the house against his will, leaving the remainder of the occupants tied.

Arkansas Code Annotated § 5-11-102(a)(3) (Repl. 2006) provides that a person commits the offense of kidnapping if, without consent, he restrains another person to a degree that substantially interferes with that person's liberty with the purpose of facilitating the commission of any felony or flight thereafter. Appellant argues that, because there was no express testimony that two of the victims did not consent to their restraint, the evidence was insufficient to show that he kidnapped those persons. This argument is completely without merit. Arkansas Code Annotated § 5-11-101(3)(A) (Repl. 2006) provides that the term "restraint without consent" includes restraint by physical force or threat. The purpose of the restraint and absence of consent may be inferred from circumstantial evidence. *Green v. State*, 313 Ark. 87, 852 S.W.2d 110 (1993). The evidence recited above was clearly sufficient to

prove that physical force or the threat thereof was employed to accomplish all of the kidnappings.

Next, appellant argues that none of his convictions are supported by substantial evidence because the evidence identifying appellant as one of the robbers was patently incredible. We do not address this argument because it is not properly before us. In addition to his directed-verdict motion challenging the sufficiency of the proof of consent with respect to the two kidnapping counts discussed above, appellant requested a directed verdict on all charges “based upon a lack of proof and not enough evidence to go forward, not making a prima facie case.” The element of the crime that the State failed to prove must be specifically identified in a motion for a directed verdict. *Brown v. State*, 368 Ark. 344, 246 S.W.3d 414 (2007). Here, appellant failed to specify the element and the proof that was missing, and his claim of insufficient evidence of identity is not preserved for appeal. *Id.*

Finally, appellant contends that the trial court erred in denying his motion for a mistrial. A mistrial is a drastic remedy and should only be declared when there is an error so prejudicial that justice cannot be served by continuing the trial, or when fundamental fairness of the trial itself has been manifestly affected. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006). The trial court has wide discretion in granting or denying a motion for mistrial, and, absent an abuse of that discretion, the decision will not be disturbed on appeal. *Id.*

Appellant’s motion for mistrial was grounded on the fact that a police officer testified at trial that appellant’s co-defendants had identified him as one of the perpetrators. Appellant’s

attorney was questioning the officer as to why he did not attempt to obtain a photo-spread identification from one of the victims when the following transpired:

DEFENSE ATTORNEY: Are you aware of anyone in the North Little Rock Police Department made [sic] an effort since October 26th of last year to find her?

OFFICER GIBBONS: No, sir, I did not.

DEFENSE ATTORNEY: Would that have been good investigative work to try to do that?

OFFICER GIBBONS: I'm not saying it would be good investigative work or bad investigative work. In this case, we have three people positively identified [appellant] as being one of the individuals who did this robbery and who kidnapped them.

DEFENSE ATTORNEY: You have how many people?

OFFICER GIBBONS: Three different that state that [appellant was one of the perpetrators].

DEFENSE ATTORNEY: And, who were these people?

OFFICER GIBBONS: One being [the drug dealer], the other one being Thomas Jones, and the other one being Marteness Brown.

Appellant then moved for a mistrial on the grounds that Officer Gibbons had testified that appellant was implicated by statements given by co-defendants Jones and Brown. The trial court denied the motion because the testimony was responsive to the question. Appellant argues on appeal that this was error. We do not agree.

We think that Officer Gibbons clearly could have believed that the answer given was a legitimate response to the question posed by defense counsel, and under such circumstances it is not an abuse of discretion for the trial court to refuse to grant a motion for mistrial. *Woods v. State*, 342 Ark. 89, 27 S.W.3d 367 (2000). Under the invited-error rule, one who is responsible for error cannot be heard to complain of that for which he was responsible. *Morgan v. State*, 308 Ark. 627, 826 S.W.2d 271 (1992).

Affirmed.

MARSHALL and HEFFLEY, JJ., agree.